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LIEN OF SOLICITORS AND ARBITRATORS AND THEIR PROTECTION FROM PRODUCING DOCUMENTS ON GROUND OF LIEN.

The ordinary rule of law is that documents must be proved by primary evidence except in certain specified cases mentioned in S. 65, Evidence Act (I of 1872). Primary evidence means the document itself produced for the inspection of the Court—S. 62 *ibid.* Both these provisions forcibly illustrate the maxim that the best evidence that the case admits of must always be produced. Where, therefore, a plaintiff sues on a document which is not in his possession, but in the power of another—whether a party to the suit or a stranger and the opposite party does not by his pleadings admit the existence and contents of the document so as to make its production perfectly immaterial, it becomes essential that the plaintiff should take steps to have it produced before the Court. If the document be in the possession of the defendant, the Court is empowered by S. 130, Civil Procedure Code, to order its production *suo motu,* and the following section authorizes the plaintiff to give notice to the defendant through the Court to produce it. If the defendant wilfully fails to comply with an order of Court to produce the document, he is liable to have his defence struck out under S. 136, Civil Procedure Code. But there are cases where the production of the document is so essential to the success of the plaintiff's case that he is unable to obtain a decree, unless it be produced. This will be illustrated *infra.* Now taking the other contingency—supposing the document is not in the possession of either party, but of a stranger, S. 159, Civil Procedure Code, empowers the plaintiff to apply to the Court for a summons against the person having possession of the document. If the person so summoned produces the document either in person or by agent—well and good—there arises no complication at all. The Court is

seized of the document and can proceed to dispose of the case according to its merits. But supposing such person refuses to produce the document. The question on what grounds he may refuse is one of very great consequence and no little difficulty. The only two excuses that a witness may make and known to the law are (1) privilege and (2) lien. Under the cloak of privilege, he may excuse himself on the ground (*a*) that the document wanted is his own title-deed or in virtue of which he holds any property as pledgee or mortgagee, or (*b*) that its production might tend to criminate him, or (*c*) that it is part of an official record relating to affairs of state, or (*d*) that it constitutes a communication made to him in official confidence and that public interests would suffer by disclosure, or (*e*) that it came to him as a professional communication—see Sections 121 to 132, Evidence Act. These rules of privilege and prohibition rest on grounds of public policy. But under this head, a solicitor or attorney or advocate cannot excuse himself where the production of the document is wanted by his client. In this last case he may only plead his *lien*. The question is—is it competent to him to so plead? In some cases cited at page 803 of Amir Ali's Evidence Act it was ruled that a witness cannot withhold production of a document called for as evidence, on the ground of any *lien* he may have upon it. In some other cases cited on the same page this doctrine is qualified by stating that if the party requiring the production be himself the person against whom the claim of lien is made, then he may rightly refuse to produce it, and the Court will not compel him to do so. Mr. Amir Ali's own inclination of opinion as is apparent from his note seems to be in favour of the *unqualified* doctrine. The latest authority in England on the point seems to be the case of *In re Hawkes, Ackerman* v. *Lockhart*, L.R., 2 Ch. 1—C. A., 1898; the head-note runs as follows :—" A solicitor having a lien on documents in his possession belonging to his client, party to an action, may not embarrass proceedings taken in the action by a third party by refusing to produce the documents if wanted by that third party for the purpose of his proceedings, even though the documents may have come into the solicitor's possession before the commencement of the action." At the time of the death of a testator, his solicitor, C., had in his possession certain documents belonging to the deceased, and on which he, C., had the ordinary solicitor's lien. Subsequently, th-

executors of the deceased employed C. to institute an action for the administration of the estate, and the usual administration judgment was pronounced. The action after judgment not being prosecuted with due diligence, conduct of the proceedings was, by order, given to a creditor, the estate being insolvent. The executors, however, remained parties, and C. continued to act for them:—*Held*, by the Court of Appeal (affirming *Kekewich*, J.) that, notwithstanding his lien, C. was bound to produce to the creditor the documents in his possession, to enable the creditor to take steps for getting in a mortgage-debt due to the estate.

In this case the principles and extent of a solicitor's lien were discussed at considerable length by the Master of the Rolls and Lord Justices *Rigby* and *Vaughan Williams*. In the case the documents were, however, required by a third party. The latest direct authority in England seems to be the case of *Fowler* v. *Fowler* reported in Volume 50, Law Journal Reports at page 686, Chancery. The facts were these:—Emma Fowler sued her husband Samuel Fowler, his two sons by a former marriage and the two trustees of her marriage settlement, (mainly) to obtain a declaration that certain furniture, linen and other miscellaneous articles were comprised in her marriage settlement. The settlement was executed by all parties in the presence of Mr. F. W. Oliver, Solicitor. Mr. Oliver was served with *a subpœna duces tecum* to attend as a witness on behalf of the plaintiff and to produce the marriage settlement. He objected to produce it as he had not been paid his costs of preparing it. Counsel for plaintiff contended that the witness could not set up his lien against her while Mr. Oliver claimed that he was not bound to produce until his costs were paid. Mr. Justice *Kay* held that the solicitor was bound to produce the settlement.

Of the Indian Cases on the point we have been able to trace only two. The first is the case of *Swinhoe and Chundar* v. *Herā Lal Sirkar* reported in the 2nd volume of the Calcutta Weekly Notes at p. 727. The facts were these:—A firm of solicitors were summoned to produce certain documents before a Subordinate Judge. They objected to do so claiming a lien upon them for costs due to them from the party at whose instance the documents were called. Their objection having been overruled, they moved the High Court under S. 15 of its Charter. *Held*, that the High Court is not compelled to use the

power of superintendence created by the Charter, unless, in the interests of justice, it finds it necessary to do so, and that in the case before them there was no danger of any such failure of justice, specially having regard to the fact that the loss of this particular remedy, assuming the attorney to be entitled to it, did not involve the loss of his costs, as he still had all the other remedies for the recovery of his claim, which he has in common with all the members of the community. This case was argued by the Advocate-General and Mr. Pugh before a Bench consisting of *Sir Comer Petheram*, C. J., and *Morris* and *Okineally*, J. J. It is to be regretted that the Judges did not decide the point that was raised before them, but cut the Gordian knot by refusing to interfere.

The other case is that of *in the matter of Mr. Cyril Kirkpatrick* reported as No. 22, Punjab Record, 1897, and decided by *Roe*, C. J., and *Chatterji*, J., of the Punjab Chief Court. The facts were as follows :—A., a father, had certain disputes with his son, B. Both appointed C. and D. as arbitrators to settle all matters in difference between them. An award having been published by C. and D., one of the parties applied to the District Judge to have the award filed under S. 525, Civil Procedure Code. The District Judge called upon C., in whose possession the award was, to file it in Court. This the latter refused to do on the ground that in taking up the arbitration he did not intend to act gratuitously, that he had not received his fee as arbitrator which the referring parties refused to pay, that he had a lien on the award for such fee, and that if he produced the award in Court he would be left without a remedy for its recovery. The District Judge considered these objections untenable. C. applied to the Chief Court on the revision side under S. 622, Civil Procedure Code.

For the plaintiff it was contended that the application for revision did not lie; that the Chief Court should not interfere as the applicant had other and more suitable remedies, and that the petitioner had no lien on the award. *Held*: (i) that the Chief Court had jurisdiction to entertain the application for revision; (ii) that in the absence of any express promise by the parties to a reference to remunerate an arbitrator, the latter has no right of action in respect of such remuneration, his sole remedy being to refuse to deliver his award until his charges are paid; and (iii) that on general principles and in the absence of any direct provision to the

contrary, an arbitrator has a lien on his award for the payment of his reasonable charges. It was also held that the sections of the Indian Contract Act relating to liens are not exhaustive, and do not negative the existence of liens not therein specified. The Chief Judge held that an arbitrator may properly be regarded as an ordinary seller and entitled to a lien under S. 95 of the Contract Act.

It will be observed that this case decided the following points:—(*a*) That the High Court could properly interfere on revision in such a case; (*b*) that an arbitrator has a lien on his award until delivered; and (*c*) that a Court could not compel him to produce a document over which he had such lien. On the first point this ruling is in conflict with the Calcutta case cited *supra*. Here it might be said that the exercise of the powers of revision is a matter of discretion; but it is very questionable whether it is proper to exercise such power at the instance of a stranger—a third party. The language of S. 622 would appear to show that the power should be exercised only at the instance of the parties to the suit, to whom by law a right of appeal is in the particular instance denied.

"As to the competency of an arbitrator to sue for his fees, though the cases are not quite agreed on the subject, the better opinion is that the appointment of an arbitrator is not of such a nature as to raise an implied promise to pay him a reasonable compensation for his services"—*Russel*, p. 493. "Unless there is an express promise to pay, he may not sue; for his remuneration like that of a physician or barrister is left to the option of his employers. Again the arbitrator has a lien for his reasonable costs on the award and the submission. As the retention of the award is the only security on which practically he can rely for the satisfaction of his claim, the practice commonly prevails not to deliver the award up to the party demanding it, until he has paid the arbitrator's charges"—*Russel*, p. 494. The Judges of the Punjab Chief Court relied on these extracts from *Russel* in support of their view that an arbitrator had a lien on the award. Be that as it may, the important question was, whether an arbitrator entitled to this lien could still withhold the award when called upon by a Court of Justice to produce it. The Chief Court decided this point in favour of the arbitrator on the authority of *Bai Kesserbai* v. *Narranji Walji*, I. L. R., 4 B., 353. This latter case was decided by a single Judge. The facts were as follows:—P. was solicitor for plaintiff. When the case was about to appear in the list for hearing. P. wrote to the plaintiff, requesting an advance to

enable him to deliver briefs to counsel. P. received no reply from the plaintiff, who appeared by other solicitors in the suit. P. was subsequently served with a *subpœna* to produce, at the hearing, certain documents relating to the plaintiff's case which had remained in his possession, and upon which he claimed a lien in respect of costs due to him by the plaintiff. *Held*, by Mr. Justice *West*, that P. could not be compelled to produce. This decision was based on certain English decisions which were cited before the learned Judge—not those which we have cited *supra*, which were not then available. It is presumed that the decision would have been otherwise had these decisions existed and been brought to his notice. It seems hard and unreasonable that an arbitrator, without any express promise of being remunerated, should wantonly and wrongfully withhold his award except on payment of an extortionate fee and then the Courts should be powerless in the matter. Whatever his lien, the English Courts have decided that the holder of the lien can be compelled to produce the subject of lien under a *subpœna duces tecum*, and this seems to be the more reasonable and logical view. In the Bombay case no great hardship was caused to the client, because what the solicitor withheld was some translations of documents made by the Court Translator, and, as the Judge remarked, it was open to the client to procure other translations, but the matter becomes very serious when an arbitrator undertaking an arbitration without express promise or expectation of payment suddenly takes it into his head to demand an extortionate fee. In that case the client has two remedies:

(*a*) to sue to have his fee fixed separate and the award delivered; or

(*b*) to apply to the Court to issue a summons to the arbitrator to produce the award; and if he fails to do so, to proceed against him by attachment of his property—S. 168, Civil Procedure Code.

The former is expensive and dilatory and the persons interested would naturally fight shy of it; the latter is more speedy and effective, and we see no cogent reasons why the courts should embarass the course of justice by refusing their help in the matter, considering that it is both more expedient and inexpensive. The result is that neither a solicitor nor an arbitrator is entitled to refuse or withhold a document on ground of lien.

MADAN GOPAL.

TRANSLATED FROM THE MADANA PARIJATA.

The share of the grandson in the grandfather's property.

On this subject, Yajnavalkya says: "The allotment of shares among sons of different fathers is according to the fathers."[1] Sons of different fathers], the meaning is sons begotten by several brothers on their several wives. Among these, the allotment of shares in the property of the grandfather is according to their respective fathers. The purport is this: if there are three brothers, and one of them has one son, another two, and the third three, then these six (grandsons) do not divide their grandfather's property into six shares and take each a share; but the grandfather's property should be divided (first) into three shares among the three brothers, and the only son of one brother shall (then) take the one share of his father, the two sons of another brother the share of their father; and similarly in the other case also. If after the begetting of sons, some of the brothers die and some others are alive, then the division between the brothers and brothers' sons shall be on the lines laid down already, *i.e.*, the brothers shall take their own shares and the brothers' sons shall take their fathers' shares.

The same author states a distinction in the case of a partition taking place with the father of the grandfather's property: "In land acquired by the grandfather, in corrody or in chattels, the ownership of both father and son is equal."[2] Land] rice-field, etc. *Nibandah*] an assignment or corrody; so many leaves receivable from a plantation of betel-pepper, or so many nuts from an orchard of nuts; this is called corrody, because it is by this computation that quantities of leaves, etc., are assigned by those conversant with that trade. Chattels] gold, silver, etc., obtained by acceptance of gift, conquest, trade, agriculture, etc. In the property of the grandfather consisting of all these, the ownership of both father and son is equal. Therefore, the meaning is that the restrictions such as "'while the father is alive partition should take place only with his consent,' 'the father shall take two shares' and 'the allotment of shares shall be according to the fathers', etc., do not apply. The ownership of the grandson begotten by a Sudra upon a female slave is the same; but there is a distinction with regard to his share. The

1. Yajnavalkya, II, 120. 2. *Ibid*, II, 121.

special mode of division in his case is the same as that laid down for the partition of a subsequently born son.

Nor could it be objected that there is an inconsistency as the text 'among sons of different fathers', etc., lays down the right of the grandson in the grandfather's wealth to be through the father and not by himself and as the text 'in land acquired by the paternal grandfather, etc.', lays down the equal right of the father and the son in the grandfather's wealth. The text 'among sons of different fathers, etc.', applies to the partition of the grandfather's wealth among grandsons whose fathers are dead.

This is indicated by the expression 'the allotment of shares is according to the fathers'; it is understood that the grandsons have a claim to the grandfather's property only through their fathers. This, however, does not hold good where the father is alive, as he has ownership in the grandfather's property by his mere birth; but if the father is dead, the grandsons have a right to the property, as the father's right to it has ceased by his death; thus the mode of division of the grandfather's property is restricted by the text: "the allotment of shares among sons of different fathers is according to their fathers." "Land acquired by the grandfather"; this applies in respect of the grandson's right to the grandfather's property when both the father and the son are alive; and this is indicated by the portion of the text 'of the father and the son in that property shall be equal'; for as the deceased could have no ownership, the portion of the text, 'the right of the father and the son in that property shall be equal' would have no application where either of them is dead. Where there are three brothers, and one of them has one son, another two and the third three, and where all the fathers and sons are alive, the allotment shall be made as formerly laid down. But if, however, among the issue of one brother both sons and grandsons exist, among the issue of another only sons are alive and among the issue of the third only grandsons, then the sons of the living father take the grandfather's property as laid down by the rule 'land acquired by the grandfather'. Where the sons have predeceased and the grandsons alone are alive, then the grandsons only shall not take their shares. This is according to the principle of the text, 'among sons of different fathers, etc.,' and not of the text 'in land acquired by the grandfather', for their fathers are dead; this rule

of division applies only where the grandfather is dead. Where the grandfather is alive, partition takes place at the will of the grandfather or his son but not at the will of the grandson; because when speaking of the time of partition it has already been said that partition takes place at the will of the father sometimes and at other times at the will of the son.

The determination of the share of the mother.

On this subject, Yajnavalkya says: "If he make the shares equal, then his wives should be made equal sharers, if no *stridhana* had been given them by the husband or the father-in-law."[1] The word '*sama*' (equal) denotes that these should be neither less nor greater; or the word 'equal' may refer to the allotment of shares as pointed out in the text 'they take four, three, two and one shares respectively'; it is said to be equal, being legal, *i.e.*, in conformity with the codes of law. Such being the case, if the father makes of his own free will his sons equal sharers, then his wives also should be made equal sharers. If the sons begotten on Brahmini and other wives be equal sharers, then their respective mothers also shall get equal shares; if, however, the *murdhávasikta* and other sons get three, two and one shares respectively, then their mothers also shall take equal shares with their sons.

To whom no *stridhana* had been given] ornaments, etc. If stridhana had been given, then the mode of allotment should be understood to be that laid down in the chapter on *Adhivedhakani* (property given at the time of supersession). The manner laid down there is this, *viz.*, if it had been given, a half is ordained. The word 'half' (in 'half' is ordained) means 'a portion' not an exact moiety.

By how much money the *stridhana* falls short of the son's share so much money should be given and the wife's share made equal to the son's. But if it be objected that on this view *stridhana* will become partible, only the mode being different, and that this would conflict with the text laying down the impartibility of *stridhana*, it is unsound. Where there is a special rule, the general rule of impartibility of *stridhana* yields, but where there is none, it stands good. Here the texts 'to whom no *stridhana* has been given',

1. Yajnavalkya, II, 115.

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and 'if it has been given, a half should be given' must necessarily be read together and are exceptions to the general rule. But when the father makes an unequal distribution according to the text 'he may give the eldest the best share', then the wives do not get the best shares, etc.; but only take equal shares in the common property left after the allotment of the best shares, etc. They also get the deductions allowed for them.

Likewise; Apastamba: "*Paribhánda*, the household ornaments belong to the wife, as also household utensils."[1] *Paribhánda*] millstone, mortar, pestle, winnowing basket, etc.

Even at the partition instituted by the sons after the death of the father, the mother gets on equal share. So Yogisvara: "Of sons dividing after their father, the mother also takes an equal share."[2] After the father] after the father's death. Here also the two texts: 'to whom no *stridhana* had been given by the husband or the father-in-law' and 'if given, a half is ordained', should be applied, because of parity of reasoning and of want of anything to the contrary; this is the view of Vijnanesvara, Dháresvara and others. Otherwise, the word 'half' in 'if given, a half is ordained' will denote an equal partition; therefore, it is implied that in case there is stridhana, a half of the share of a son should be given, *i.e.*, if the son has ten nishkas, then the mother should be given an allotment of five nishkas. The ornaments of the wives of brothers are certainly indivisible, likewise even where the females themselves are parties to the partition, the ornaments previously given severally to each of them are also indivisible; and this will become clear in the chapter on 'impartible wealth'. When, however, the father and the son divide and take the wealth acquired by the grandfather, then the wife of the grandfather gets an equal share with her son, in the manner already laid down, in the text: "The mother too gets an equal share," and because it is the property of the grandfather. If the wives of the paternal grandfather are issueless, then they receive their ornaments given out of affection and no share. Thus at a partition of the effects of the grandfather, the mother does not receive a share, but only her ornaments, etc.

"If he makes the shares equal, his wives shall be made equal sharers," likewise "let them divide after the death of the father;

1. Apastamba, II, 6, 14, 9.   2. Yajnavalkya, II, 123.

Acc. No.

and the mother also shall take an equal share;" for these texts apply to the case in which the father has predominant interest; that wealth which the father obtained at a partition or acquired by acceptance of gift is wealth in which the father had a predominant interest. It has been already said that the father's wealth goes to the son.

On the question who is entitled to the mother's wealth, Yajnavalkya says: "The wealth of the mother remaining after discharging her debts, the daughters shall take; in their default, their issue."[1] The daughters shall divide and take the mother's effects remaining after discharging the debts contracted by her. The distinction in this case is this: Where there are both married and unmarried daughters, the unmarried daughters alone shall take. In the absence of the unmarried daughters, the poor among the married daughters shall take.

Likewise Gautama: "The *stridhana* belongs to the daughters unmarried and unendowed." *Apratta*] unmarried.[2] Unendowed] poor. In default of daughters, as in the absence of sons, the issue of the daughters (succeed). The meaning of this, viz., that the daughter takes the property first and then their issue, is stated in the latter portion.

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Next, persons competent to take the Stridhana of a woman dying without issue.

On this point, Yajnavalkya: "If a woman dies leaving no issue, her relations shall take that; the *stridhana* of a woman married in the four forms of marriage, Bráhma, etc., goes to her husband; if in the other forms of marriage, it goes to her parents. But if she has issue, it goes to her daughters."[3] The *stridhana* of a woman dying without any issue, *i.e.*, having no daughter, daughter's son, son or son's son, etc., her relatives as husband, etc., take. If the woman is married in (any of) the Bráhma, Daiva, Arsha or Prájápatya forms, dies, her husband gets her wealth; in default of him, those persons who are nearest related take. The inference is that in their absence, those who are nearest in the father's line take. The wealth of a woman married in (any of) the remaining Asura,

1. Yajnavalkya, II, 117.
2. Gautama, XXVIII, 24.
3. Yajnavalkya, I, 145.

Gandharva, Rakshasa and Paisacha forms, the parents take; first, the mother; and in her absence the father; in default of him, the nearest relations in the family of the husband; in default of them, the nearest relations in the family of the husband. If she has issue, her wealth goes to her daughters and her daughters' sons, etc., in whatever form of marriage she might have been married. If the term 'daughter' here were taken to denote the daughter of the mother whose wealth is divided, it would simply be repeating what has been already laid down in the text, 'the daughters shall take the wealth of the mother remaining after discharging her debts." Even among granddaughters, if there exist both married and unmarried, the unmarried alone take; if there are both endowed and unendowed, the unendowed alone; if there exist granddaughters unequal in number born of different mothers, the allotment of shares is by the mothers. That is stated by Gautama: "There is a special mode of division in the case of the lines of the father, mother and sister."[1]

If there exist both daughters and granddaughters, something but not a share should be given to the granddaughters out of affection. So Manu: "To the daughters even of these (daughters), something according to merit should be given out of the grandmother's property, as a token of affection."[2] Daughters of these] daughters' daughters in the absence of granddaughters, daughters' sons shall take, as is laid down by Narada: "The daughters shall take the wealth of the mother; in the absence of daughters, their issue."[3] The meaning is that the daughters take the wealth of the mother; in the absence of these daughters, her progeny, *i.e.*, daughters' sons. Another reading is 'the issue' (nominative singular).

So the daughter's sons alone take; not the issue (daughter) of the daughter's daughter, as she is more remote than the daughter's son. In default of these daughters' sons also, the sons, grandsons, denoted by the word 'issue' in "the daughters take what remains of the wealth of the mother after discharging her debts, and in their default their issue," take the wealth in their order. With this same idea, Manu says: "After the death of the mother, the uterine

1. Not found. 2. Manu, IX, 193. 3. Narada, XIII, 2.

brothers shall divide her wealth equally, as also unmarried uterine sisters."[1] The purport of this text is: "those sisters who are born of the same mother take; in their absence, their descendants up to daughter's son take; in their absence, the (uterine) brothers. The brothers of the deceased woman and not the sons of co-wives take; in their default, the grandsons." The use of the word 'uterine' in 'the uterine brothers shall divide equally' is to exclude the sons of co-wives. In the absence of her own sons, the sons of co-wives succeed; if, however, the daughter of a co-wife belongs to a higher caste, than the son of another co-wife, then the daughter of higher caste alone takes; in her default, the daughters' sons of the same description alone.

So also Manu: "The wealth of a woman given her by her father, the Brahmini daughter takes; or else it goes to her issue."[2] It is said that the maiden takes the wealth of the woman; the word 'woman' is used absolutely, and so also the word 'maiden.' As these two words 'woman' and 'maiden' are not co-relatively used, these may be understood to refer to the stepmother and the stepdaughter also. The word 'Brahmini' is used illustratively of a maiden of higher caste. Thus the stridhana of a Sudra woman, the Brahmini, or Kshatriya or Vaisya daughter takes; so the Brahmini or the Kshatriya daughter takes the stridhana of a Vaisya woman; and likewise the Brahmini daughter takes the wealth of the Kshatriya woman. Here as it is stated that a daughter of a co-wife of high caste takes the property of a woman of a lower caste, it is understood that the daughter of a co-wife of a lower caste has no right to the wealth (of a woman of a lower caste) if there exists sons of a co-wife of a higher caste.

In default of sons and grandsons, the brother takes; in his default, his sons; thus in this order the brothers, etc., are heirs. The stridhana, excepting sulka alone, should be divided; for the brothers alone take the sulka. So Gautama: "The sister's sulka belongs to the uterine sisters, and after them to the mother."[3] The meaning is that even, if the heirs from daughters to son's son are alive, the uterine sisters shall alone take the sister's sulka. Something about a betrothed damsel is stated in the connection of stridhana.

1. Manu, IX, 492. 2. Ibid, IX, 198.
3. Gautama, XXVIII, 25.

Yajnavalkya: "He who having betrothed a damsel (to a certain person) afterwards keeps her from him, should be punished, and made to pay the expenses with interest; if she dies, let him pay what was given (by the bridegroom for the damsel) after calculating the expenditure of both parties."[1] A father who having promised his daughter (to a person) takes her back from him, even though he is free from defect, should be punished by the king, according to his caste, wealth and general character, etc. He should be made to return to the bridegroom with interest all the money spent by the bridegroom, his father, etc., for the betrothal. If the betrothed damsel dies before marriage, the bridegroom shall take back the sulka previously given (to the damsel), *e.g.*, rings, etc.; after doing what? after calculating the expenditure incurred both by himself and the giver of the bride; (the meaning is) let the bridegroom take only what remains of the property given to the damsel, *e.g.*, rings, etc., after deducting from it the expenses incurred by both the parties on account of the betrothal.

Baudhayana states a distinction in the taking of head ornaments, etc., given out of affection to a damsel before the time of betrothal, by her mother's father, father, etc., intending her own ownership: "Let the uterine brother always take the wealth of a deceased damsel; in his default, the wealth goes to the mother, and in her default to the father."[2] By an easy transition from the subject on hand, something is said even in the case of the living wife.

Yogisvara: "The husband need not repay to the wife stridhana taken by him during famine, for the performance of religious duties, during disease or while in duress."[3] Performance of religious duties], *i.e.*, those which should indispensably be performed. If under these cirumstances, the husband having no other resource takes the *stridhana*, he need not return that wealth to her; the meaning is that he cannot be compelled to repay; if under other circumstances, it should certainly be repaid, as the husband only is permitted (to take) in the above-mentioned circumstances and as punishment is laid down in the case of others, according to the text: "Those relatives who take perforce their wealth while they are alive, a righteous king should visit with the punishment for theft."[4]

1. Yajnavalkya, II, 146.
2. Not found.
3. Yajnavalkya, II. 147.
4. II. Cole. Dig. 598 CCCCLXXX.

Yajnavalkya thus lays down the nature of *stridhana*: "What is given by the father, mother, husband and brother, what is obtained before the nuptial fire, and what is given at the time of supersession, etc., are declared to be stridhana; as also what is given by relatives, Sulka and Anvadheyaka." Obtained before the nuptial fire] given by maternal uncles, etc., at the time of marriage before the fire.

Adhivedhanika is also described thus: "To a superseded wife, let him (the husband) give an equal sum, for the act of supersession, provided stridhana had been given her; but if it had been given, one half shall be allotted."[1] A superseded wife is one over whom a second marriage is contracted. The meaning is that adhivedhanika is money given to her for being superseded; he shall give an equal sum]. the meaning is that a sum equal to that spent in ornaments, etc., for the second wife should be given to the first (superseded) wife. Here he lays down a distinction: 'to whom no stridhana had been given.' The meaning of this has been explained at length in the connection of the determination of the mother's share. By the particle 'etc.,' in 'adhivedhanika, etc.,' are meant what was gained by the spinning of cotton, sale, partition, acceptance of gift, finds, etc.

Katyayana: "Whatever is given to women at the time of their marriage before the nuptial fire is denominated by the sages 'stridhana given before the nuptial fire.' Again what a woman gets when being led from the house of her father (to that of her husband) is called '*stridhana* given at the time of the nuptial procession.' Whatever is given out of affection either by the mother-in-law or father-in-law, as a token of affection, and that which is given in return for her humble prostrations is called '*stridhana* given out of affection.' What is received by a woman before or after marriage in the house of her husband or of her father, from her brother or her parents, is called saudayika. What is received by a woman after marriage in the family of her husband or in the family of her father is called gift subsequent."[2]

S. SITARAMA SASTRI.

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1. Yajnavalkya, II. 148.
2. II. Cole. Dig. 585 CCCCLXIV & V. & 586 CCCCLXVI; 587 CCCCLXVIII,

NOTES OF INDIAN CASES.

Ramachandra Rayaguru v. Modhu Padhi, I. L. R., 21 M., 326. The question in this case was as to the applicability of Art. 132 or 147 to suits for sale of mortgage instruments. The Court by a majority of three to two held that Art. 132 applied. Chief Justice *Collins* was one of the members constituting the majority, and though his present view is at variance with the decision in *Udayana* v. *Senthivelu*, I.L.R., 19 M., 411, in which he appears to have taken part, he vouchsafes no explanation for the change. We have carefully perused the elaborate arguments of *Shephard* and *Subrahmania Aiyar*, JJ., by means of which they arrive at the conclusion that Art. 147 is only applicable to suits for foreclosure or sale in the alternative. Mr. Justice *Subrahmania Aiyar's* judgment deals with the proceedings of the Legislative Council, the language of the several Bills that were before the Council and refers to a multitude of circumstances relating to the history of the article in support of the interpretation. We believe he must have been aware of the decision of the Privy Council in *Administrator-General of Bengal* v. *Prem Lall Mullick*, L. R., 22 I. A., 107, deprecating all reference to proceedings of the Legislature or the state of things antecedent to the enactment of the law in interpreting the provision of a Statute. See *Queen-Empress* v. *Sri Churn Chungo*, I. L. R., 22 C. 1017, and *Norendra Nath* v. *Kamalbasini*, 23 I. A., 18. Dealing with the language of the article itself, the argument that he advances in favor of his interpretation is that otherwise there would be no article applicable to suits for foreclosure or sale in the alternative or Art. 120 alone could apply. We confess we are unable to see the force of this contention. Because there is one article for the recovery of immoveable property and another for the recovery of moveable property and none for the recovery of moveable or immoveable property it cannot be said that a suit of this latter description is unprovided for, or must wholly fall under Art. 120. The plain rule appears to us to be to hold that a suit for foreclosure or sale in the alternative would fall within the article even though you have to read it distributively. Mr. Justice *Shephard* again thinks that as English mortgages give rise to suits for foreclosure or sale and they were dealt with by a special clause in connection with the Presidency towns before the present Act, Art. 147 of the present Act must, therefore, be regarded as referring to such suits wherever they may be instituted. This reasoning also does not commend itself to us. The natural interpretation of the article is to regard it as dealing with suits for foreclosure and with suits for sale. To set aside this simple grammatical interpretation which is also logical, there

must be very strong reasons indeed. We are unable to find any. It may be said and, we would quite agree, that a long period like 60 years is unnecessary for suits for sale. But that is a matter for the Legislature. We may also be of opinion that the abnormally long periods provided for some other cases are equally unnecessary. There is no special argument to be brought forward in the one case any more than in the other from the undesirability of this lengthy period.

Kombi Achen v. Kochunni, I. L. R., 21 M. 352. S. 561 entitles the respondent to raise objections to the decree of the court below upon the hearing of the appeal. The right to the objections being heard would seem to depend upon the question whether the appeal itself is heard. If the appeal is thrown out on the ground that no appeal lies or that it has been filed out of time or the appeal abates or is withdrawn, it is clear that the appeal is not heard and, therefore, the objections of the respondent cannot be. There may be a question, however, where the appeal itself is heard though it is ultimately disposed of on the ground that no appeal lay or that it was barred by time. We should imagine that, although the section has been literally complied with, the disposal of the case on one of these grounds involves a refusal to hear the appeal and, therefore, the respondent's right to have his objections heard must fail. There is an observation in *Kamat* v. *Kamat*, I. L. R., 8 B. 368, that even though it may be ultimately held that no appeal lies, if it has been heard, the respondent's right to raise objections subsists. We are unable, however, to accept this decision as correct. It is a little more difficult to determine whether an appeal is heard when it is dismissed on the ground of non-joinder of proper parties to the appeal. We conceive that the plea of non-joinder which affects the hearing of the appeal would generally affect the memorandum of objection too. But even if it does not, can it be said that the appeal is heard when it is dismissed on the ground of want of parties? The objection is one which does not affect the suit itself and the appeal which seeks to upset the decision by the court below upon the issues in the case remains unheard when the objection of non-joinder affects the appeal alone. In a general and loose sense, it may be said that the appeal must be heard before the non-joinder may become clear; and if it is in this sense that the hearing is spoken of in S. 561, the decision in the case under notice may be right.

Sethuravar v. Shanmugam Pillai, I. L. R., 21 M. 353. This case involves several difficulties which have not been satisfactorily overcome by the learned Judges. There is no doubt that if an agent has obtained an advantage the principal is entitled to it. If he has recovered money

due to the principal, the principal would be entitled to it. Where he has merely obtained a decree upon the bond, we do not see how that is an advantage which the principal can take. A principal cannot execute a decree which an agent has obtained. He may obtain a declaration that the decree was obtained by a person as his agent; but that will not entitle him to do anything unless the law of procedure enables him to get into the shoes of the agent and execute the decree. But this evidently it does not.

Assuming that a man can obtain a declaration that another has obtained a decree as benamidar, is it so clear that he can execute the decree, unless there is a transfer by operation of law? S. 232 enables the transferee to apply for execution; and Ss. 91 and 95 of the Trusts Act refer to cases of property vesting in one for the benefit of another. The benamidar had the benefit of a contract which has been merged in a decree and the decree is no more a right *in rem* than the bond upon which it is obtained. We cannot speak of a transfer by operation of law from the benamidar to the real owner because a decree had been obtained upon the obligation. In *Abedoonissa* v. *Ameeroonissa*, 4 I. A. 73, the Privy Council said that there was no transfer from the widow who was placed on the record on the death of her husband pending the suit to the persons really entitled, so to enable them to execute the decree as transferees of the widow. It may be that S. 232 ought to be made more elastic. But with the section as it stands it seems difficult to hold that the real owner is the transferee from the benamidar subsequent to the decree. See however *Mannickam* v. *Tattayya*, I. L. R., 21 M., 388.

Ramayyar v. Ramayyar, I. L. R., 21 M., 356. Hard cases, it is said, make bad law, and we are inclined to think that this is perhaps one of them. Every execution by a decree-holder who has been paid out of court is undoubtedly fraudulent and if the fraud is a reason for the executing court staying its hand, S. 258 should not be in the Statute book. There was a promise, it is said by the decree-holder, to certify and he executed the decree notwithstanding and purchased the property in court-sale. If the execution is legal notwithstanding the fraud, there is nothing illegal in the sale, the leave to bid and the purchase, and yet the Court has set aside the sale on the ground of fraud in not certifying satisfaction.

Subbaraya Ravuthaminda Nainar v. Ponnusami Nadar, I. L. R. 21 M. 364. The question as to the rate of interest which it is competent to the Court to award has now been determined by the Privy Council in *Rameswar Koer* v. *Mahomed Mehdi*, I. L. R., 26 C., 39. As to the

competency of the Court to fix a rate under S. 209 beyond the date fixed for realization, the Allahabad and Calcutta Courts have differed, the former holding the section of the Procedure Code inapplicable to mortgage decrees. We think the Calcutta view has been rightly preferred.

Maidan *v.* **Janikiramayya,** I. L. R., 21 M., 371. In an appeal by a defendant against a decree for mesne profits the amount of which was left to be determined in execution, the High Court held that no stamp was payable by the appellant upon the mesne profits. There is no doubt about the correctness of the decision as the mesne profits decreed were subsequent to the institution of the suit. We should think the same result ought to follow even if the amount of the mesne profits had been fixed because there is no cause of action in respect of subsequent profits or interest which are entirely within the discretion of the Court and do not form part of the subject-matter of the suit or the appeal. As we have repeatedly remarked, the Court Fees Act which is a clumsy enactment very much out of date is the parent of much injustice. Under cover of its somewhat unintelligible provisions court-fees are oftentimes demanded at random by ignorant officers from whom there is no appeal. The evil is a crying one, and it is time for the Legislature to look into it.

Mahabala Bhatta *v.* **Kunanna Bhatta,** I. L. R., 21 M., 371. The decision in this case appears to us to be very important in the interests of justice. The rules as to joinder of parties and causes of action have worked grievous injustice in many a case. But we must say that this is almost the first time when a judge has boldly stepped out of the accustomed groove and declared that a suit shall not be dismissed for non-joinder of other tenants-in-common. It is a prudent and convenient course to make all tenants-in-common parties plaintiffs or defendants. The failure to do so shall not lead to the dismissal of the suit. This salutary rule cannot apply to suits on contracts, because you cannot divide them nor to cases of joint tenants, but where the action is not upon a contract and the parties claim as tenants-in-common with others not parties, there is nothing to prevent the operation of this rule. This case appears almost an innovation in the processual law of this country, but there is nothing in the Code against it, and we, therefore, welcome it.

Venkatagiri Rajah *v.* **Ramasami,** I. L. R., 21 M., 413. The decision in *Appayasami* v. *Subba*, I. L. R., 13 M. 463, has practically been overruled by their Lordships, *Subrahmania Aiyar* and *Davies*, J. J., in this case. In *Sobhandhri Appa Rau* v. *Chellamanna*, I. L. R., 17 M., 225, the earlier case was distinguished. But the principle of the decision itself is

wrong, the rent being due on the dates on which according to the *kist bandi* it is payable, limitation must run from those dates and not from the end of the fasli. The question was more fully discussed by *Subrahmania Aiyar* and *Benson*, J. J., in *Rajah of Venkatagiri* v. *Seik Bade Sahib*, 8 M. L. J., Rep. 219, and the same rule is enunciated in *Paramasiva Goundan* v. *Kandappa Goundan*, 8 M. L. J., Rep. 201.

Sami Pillai v. Krishnasami Chetty, I. L. R., 21 M., 417. In execution of a decree for money, a decree for money which the judgment-debtor had obtained against another person was attached and under S. 293, the attached decree was executed. The judgment-debtor of the attaching decree-holder objected to the sale of the properties of his judgment-debtor as irregular and upon a decision against him preferred an appeal. The High Court had to consider the question whether an appeal lay under S. 244. That depended upon the further question whether the attaching decree-holder was the representative of a party in respect of the attached decree which was being executed. *Subrahmania Aiyar* and *Benson*, J. J., answer that the attaching decree-holder was no party and, we take it, also not the representative of a party. Their decision is opposed to *Peary Mohun Chowdhry* v. *Romesh Chunder Nundy*, I. L. R., 15 C., 371, which does not appear to have been quoted. It seems clear to us that the Calcutta decision is right. The attaching decree-holder is an assignee by operation of law and stands in the same position as the assignee of a part of the decree. Attachment may not in law operate as a transfer in interest, but the provisions of S. 273 place the attaching decree-holder in the position of a transferee of part of the decree. Suppose questions arose between the judgment-debtor of the attached decree and the attaching decree-holder in the course of execution proceedings, how are they to be dealt with except under S. 244. The attaching decree-holder cannot be the representative of a party for some purposes and not for others.

Manicka Gramany v. Ramachandraiyer, I. L. R., 21 M., 482. The question is whether a tenant who has been ejected under S. 10 of the Rent Recovery Act, can maintain a suit for posession questioning the legality of the order. S. 99 of the Act appears to us to make it clear that there is a right of appeal from the order of ejectment. S. 76 denies revision unless a right of action is especially granted. We should imagine that the order of ejectment cannot be questioned by suit. If the order of the Collector was not a judicial order it is possible to suppose that the Act does not take away a right of action which the person aggrieved may have. But there can be really no doubt that the Collector's order is judicial.

Ratnam Ayyar v. Krishna Doss Vital Doss, I. L. R., 21 M., 494. A judgment-debtor who is dispossessed of property in execution may apply for possession under the Code. But Art. 165 applies to his application.. See also *Mahomed Hossein* v. *Kokil Singh,* I. L. R., 7 C., 91. But if he happens to be a minor at the date in which his right to apply accrues he is entitled to the benefit of S. 7 of the Limitation Act which expressly applies to applications as well as to suits. See *Baldeo Singh* v. *Kishan Lal,* I. L. R., 9 A., 411; *Mon Mohun Buksee* v. *Gunga Soondery Dabee, Ib.* 9 C., 181; *Jagjivan Amirchand* v. *Hasan Abraham, Ib.,* 7 B., 179.

SUMMARY OF RECENT CASES.

Civil Procedure Code (Act XIV of 1882), *Ss.* 244, 311 *and* 588—*Application to set aside sale on the ground of fraud—Second appeal—Limitation Act (XV of* 1877), *Arts.* 166, 178.

Bhuban Mohun Pal v. Raja Peary Mohun Mukerjee.

Held—that an application to set aside a sale on the ground of fraud comes under S. 244, notwithstanding that the purchase was made by a person who was a third party, and not under S. 311, which relates to setting aside a sale on the ground of irregularity in the conduct of the sale.

Held further—that an application to set aside a sale on the ground of fraud of the decree-holder and the auction-purchaser falls within Art. 178 and not Art. 166, which relates only to an application to set aside a sale on the ground of irregularity in publishing or conducting the sale, or on the ground that the decree-holder has purchased without the permission of the Court, and that it is not barred by time :—3 *C. W. N. LXXX.*

Criminal Procedure Code (Act X of 1882), *Ss.* 145, 147, 182—*Ferry—Tangible immoveable property—Offence—Jurisdiction of Magistrate.*

Maharaja Harbullabh Narain Sing Bahadur v. Bajrang-Dass.

A ferry does not come within the description of "tangible immoveable property" as used in S. 145 of the Criminal Procedure Code of 1882. Disputes regarding ferries come within the scope of S. 147.

S. 182 relates only to cases of offences, that is, acts which are punishable by law, and a case under S. 145 is not a case relating to an offence :—3 *C. W. N.* 149.

Appeals, hearing of, when records have been accidentally destroyed—Practice —New trial, right of.

Har Kumar Pal Chowdry v. Sheikh Asiatullah.

Where, in the interval between the original hearing of a case and the appeal, the record, or the greater part of it, was destroyed in an earthquake, and the appellate Court set aside the judgment of the first Court and directed the suit to be tried *de novo*.

Held—that the mere fact that the record was accidentally destroyed cannot give the appellant a right of re-trial of the original suit, and that it is open to the Court of Appeal to try the case upon any materials proved to have been used at the hearing of the first Court, and it is for appellant to put those materials before the Court:—3 *C. W. N.* 150.

Mahomedan Law—Wakf—Alienation by trustees without sanction of Judge whether voidable or void—Right of suit—Possession.

Shama Churn Roy v. Abdul Kabeer.

A Civil Court of superior jurisdiction in the district is vested, generally speaking, with the powers exercised by the *kazi*. Before an alienation of trust property can be made by the trustee, the sanction of the *kazi*, in other words the Judge, is essential.

Where the trustees of a certain mosque without obtaining the sanction of the Judge sold the lands in dispute which formed a part of the trust property to the plaintiffs in order to raise money to meet the expenses of litigation and the repair of the mosque;

Held—that the sale was not merely voidable but void;—3 *C. W. N.* 158.

Act No. XLV of 1860 (Indian Penal Code), Ss. 192 and 193—Fabricating false evidence—False entry made by a Police officer in a special diary.

Queen-Empress v. Zakir Husen.

Held—that a Police officer who made a false entry in the special diary relating to a case which was being investigated by him could not be convicted therefor of the offence of fabricating false evidence as defined in S. 192 of the Indian Penal Code, inasmuch as the document in which the alleged false entry was made was not one which was admissible in evidence. *Empress* v. *Gauri Shankar* (I. L. R., 6 A., 42) and *Keilasum Putter* (5 Mad, H. C. Rep., 373) referred to:—*A. W. N. for* 99, *p.* 5.

Act No. XLV of 1860 (Indian Penal Code); Ss. 96 et seq.—Right of private defence—Act No. I of 1872 (Indian Evidence Act), S. 105—Presumption—Pleadings.

Queen-Empress v. Timmal.

Semble—that an accused person who at his trial has not pleaded the right of private defence, but has raised other pleas inconsistent with such a defence, cannot in appeal set up a case, founded upon the evidence taken at his trial, that he acted in the exercise of the right of private defence. *Queen-Empress* v. *Prag Dat* Weekly Notes, 1898, p. 117) referred to:—*A. W. N. for* 98 *and* 208.

Act No. XIX of 1873 (N. W. P. Land Revenue Act), S. 185—Sale for arrears of revenue—Disposal of surplus proceeds—Distribution amongst creditors of defaulter—Suit by one of such creditors against another—Cause of action.

Kunj Behari Lal v. Parsotam Narain.

An estate which had been mortgaged separately to two different mortgagees was sold for default in payment of Government revenue. By the sale a much larger sum than was sufficient to satisfy the arrears of revenue was realized. The Collector, instead of paying the surplus to the defaulter, mortgagor, paid therewith one of the mortgagees in full and the other in part. The mortgagee who had been paid in part only sued the other mortgagee for the balance due on his (the plaintiff's) mortgage, alleging that it was prior to that of the defendant and ought to have been paid off in full. *Held*, that the suit would not lie. The action of the Collector in contravention of the express provisions of S. 185 of Act No. XIX of 1873 gave the plaintiff no cause of action against the other mortgagee:—*A. W. N. for* 98 *p.* 210.

Act No. VII of 1870 (Court Fees Act), Sch. I, Art. 5—Court-fee—Review of judgment.

Imdad Hasan Khan v. Badri Prasad.

On a reference to the Taxing Officer of the Court it was *held* that the court-fee prescribed as payable on an application for review of an appellate judgment must be computed according to the valuation for purposes of court-fee of the appeal, irrespective of what may be the value of the relief sought by the application for review:—*A. W. N. for* 98 *p.* 212.

Act No. IV of 1882 (Transfer of Property Act), S. 85—Mortgage—Non-joinder of parties—Subsequent mortgagee after suit on prior mortgage filed.

Ishaq Ali Khan v. Chunni.

Held—that S. 85 of the Transfer of Property Act, 1882, does not require the joinder in a suit on a prior mortgage of a subsequent mortgagee whose mortgage was only executed subsequently to the filing of such suit:—*A. W. N. for 98 p.* 214.

Civil Procedure Code, S. 539—Suit for a declaration that a certain piece of land is a grave-yard—Jurisdiction.

Muhammad Abdullah Khan v. Kallua.

Held—that a suit for a declaration that a certain piece of land was a grave-yard dedicated to the use of such persons as had no grave-yards of their own, and asking the Court to appoint a mutawalli and settle a scheme for the management of the grave-yard, was not such a suit as fell within the purview of S. 539 of the Code of Civil Procedure. *Lakshmandas Parashram* v. *Ganpatrav Krishna* (I. L. R., 8 B., 365) and *Strinivasa Ayyangar* v. *Strinivasa Swami* (I. L. R., 16 M., 31) referred to:—*A. W. N. for* 98 *p.* 19.

Practice—Transfer of briefs—Legal practitioner appointed to judicial office.

Birju Rai v. Muhammad Zahir Alam.

Semble—that a legal practitioner who is appointed to a judicial post cannot transfer briefs held at the time of his appointment by him as such legal practitioner:—*A. W. N. for* 99 *p.* 18.

Civil Procedure Code, S. 622—Revision—Discretion of Court in exercising revisional powers—Civil Procedure Code, Ss. 623 et seq.—Review of judgment.

Abdul Sadiq v. Abdul Aziz.

A Munsif granted a review of judgment on a ground which was no ground in law for granting a review, but his order in review had the effect of making the decree in the suit a right decree instead of a wrong decree. The District Judge allowed an appeal from that order on grounds which, having regard to S. 629 of the Code of Civil Procedure, were not open to him. On an application for revision of the Judge's

appellate order it was *held* that the proper course was to set aside only the District Judge's order and to leave standing the order of the Munsif granting a review of judgment, which order, though wrong in principle, was, it appeared, right in its results :—*A. W. N. for* 99 *p.* 1.

Benami transactions, criterion—Funds out of which purchase-money paid—Possession—Receipt of rents—Rendering account.

Pundit Ram Narain *v.* Maulvi Muhammad Hadi.

In most cases of alleged *benami* transactions, the true criterion is to ascertain from whose funds the purchase-money proceeded, but it is not the only criterion where, as in this case, that fact is consistent with the defendant's case, which is that the plaintiff purchased the village for him and intended it to be a gift in return for his services; a much more important fact in such a case is the actual possession, or the receipt of the rents of the property. Plaintiff had admitted that defendant had been in possession of the collections and had not accounted for them for 9½ years.

Held—that, although the *benami* deeds are very common in India, the deed of sale in question did not appear to be of that character :—3 *C. W. N. p.* 113.

Joint-property—Deed by joint-owners of the family property appointing trustees for the management of the property, effect of—Deed by joint-owners embodying an agreement not to partition the property, effect of.

Radhanath Mukerjee *v.* Tarrucknath Mukerjee.

By an instrument, purporting to be a deed-of-trust, all the existing joint-owners of the family property deputed the management of the property to trustees for the purposes of the family solely, giving the trustees certain specific directions with regard to the management of the property and the application of the funds. The beneficial rights of the owners was in no way aliened or altered by the deed. By a clause in the deed the joint-owners bound themselves not to ask for partition of the property.

Held—that an arrangement of this kind can only be operative just so long as all the joint-owners consent to its being operative and no longer

That it is not competent for owners of property in this country by any arrangement, made in their own discretion, to alter the ordinary incidents of the property which they possess; a joint property, therefore, cannot be made impartible in perpetuity by any such arrangement, though the

owners may, for sufficient consderation, bind themselves to forego their rights for a specified time and definite purpose by a contract which could be enforced against them personally:— 3 *C. W. N.* p. 126.

Wall, common, right to erect superstructure on—Common wall—Party wall—Superstructure, right to erect, on common wall—Pessession of common wall.

Amratlal Damodardas v. Lallubhai Dalpatram.

A party has no right to erect buildings of his own on a wall which is common to himself and his neighbour without the consent of the latter, and so change its nature and virtually oust him from all possession of it:—*Printed judgments of the B. H. C. for* 1898 *p.* 373.

Civil Procedure Code, Act XIV of 1882, *S.* 257-*A—Judgment-debtor, agreement between a person other than the, and judgment-creditor for postponement of decree—Judgment-creditor—Decree; agreement for postponement of—Execution—Agreement for postponement of decree.*

Kesu Shivaram Marwadi v. Genu Babaji Powar.

The provisions of S. 257-A of the Civil Procedure Code do not include within their scope an agreement between a judgment-creditor and a person other than the judgment-debtor, whereby such person in consideration of the postponement of execution of the decree against the judgment-debtor, undertakes to pay to the judgment-creditor a certain sum of money:—*Printed judgments of the B. H. C. for* 1898 *p.* 374.

Sale without license—Sale by servant.

Williamson v. Norris [1899, 1 Q. B., 7].

The question in this case was whether a servant of the House of Commons who sold their liquor and under their orders was guilty of any offence under S. 83 of the Licensing Act of 1872, which runs as follows:—"No person shall sell or expose for sale by retail any intoxicating liquor *without being duly licensed* to sell the same." It was held that he was not, as the phrase "without being duly licensed" could not be applied to a mere servant without a straining of language. It was also held that if a guilty knowledge were proved on the part of the servant, he might, perhaps, be guilty of abetment; but that since under the special circumstances of the case no such knowledge could be imputed to him, he could not be convicted.

Workmen's Compensations Act of 1897—Injury "arising out of and in the course of employment."

Smith *v.* Lancashire and Yorkshire Railway.

[1899, 1 Q. B., 141 C. A.]

Where a ticket-collector in getting off from the foot-board of a train in motion caught his foot and fell and was killed, and an action was brought by his legal personal representative to recover the compensation provided by the Act, it was held by the Court of Appeal that since the deceased did not get on the foot-board for any purpose of his employers but only for his own pleasure, the accident could not be said to have arisen "out of" his employment so as to entitle the representative to any compensation under S. 3 of the Act.

Gratuitous bailment—Suit by bailee for injuries arising from a defect in the article lent.

Coughlin *v.* Gillison [1899, 1 Q. B., 145 C. A.]

The Court of Appeal held that in cases of gratuitous bailment, in order to make the bailor liable for any injury arising from a defect in the article lent, it must be shown that there was a concealment of any material fact *known* to him, or that there was such negligence on his part, in not disclosing the facts relating to the article as amounted to the same thing. *Blakeman* v. *Buston and Exeter Railway* (1858), 8 E. & B., 1035, and *McCarthy* v. *Young* (1861), 6 H. & N., 329, approved.

Criminal Law—No witness for the defence—Prisoner giving evidence on his own behalf—Prosecutor's right to sum up and comment on the evidence of the accused.

The Queen *v.* Gardner (1899, 1 Q. B., 150].

In this case, it was decided by the Court for the consideration of Crown Cases Reserved that the effect of the provision of S. 2, Criminal Evidence Act, 1898, that the prisoner should be called "immediately after the close of the evidence for the prosecution" was not to put an end to the right of the prosecuting counsel to sum up the evidence in the case, but only to postpone it till evidence had been given for the prisoner; and that in so summing up, the counsel was entitled to comment upon the evidence given by the prisoner.

Assignment of lease by lessee—Sub-lease by assignee by way of mortgage—Suit by lessee against the mortgagee of his assignee for the recovery of rent paid by him to the lessor.

Bonner *v.* Tottenham and Edmonton Permanent Investment Building Company [1899, 1 Q. B., 161, C. A.]

Where the mortgagee of the lessee's assignee agreed with his mortgagor to pay the rent reserved by the original lease, but failed to do so and owing to his default the lessee was compelled to pay rent to his lessor, in a suit by the lessee to recover from his assignee's mortgagee the rent so paid it was held by the Court of Appeal that there was no privity between the parties either by contract or by estate and that the suit was not maintainable, though as between the mortgagor and the mortgagee, the latter had agreed to pay the rent due to the lessor. The right course for the plaintiff in such a case was, the Court said, to sue his assignee and the assignee would then be entitled under his contract to sue his mortgagee to recover the amount paid. *Moule* v. *Garrett* (1870), L. R., 5 Ex. 132; A. (1872), 7 Ex. 101, distinguished.

Evidence of subsequent fraud—Right of Prisoner to give evidence before Grand Jury—Right of Court to comment on prisoner's failure to give evidence.

The Queen *v.* Rhodes [1899, 1. Q. B., 77.]

Three questions arose for consideration in this case—1. Whether in a trial on a charge of cheating by false pretence, evidence of similar cases of cheating subsequent to the date of the occurrence which is the subject of the charge was admissible to prove fraudulent intent. 2. Whether under the Criminal Evidence Act of 1898, the prisoner was entitled to give evidence on his own behalf before the Grand Jury. 3. Whether the Court had a right to comment upon the failure of the prisoner to give evidence on his own behalf.

On the first question the Court decided that evidence of subsequent frauds was admissible *if* the various transactions were shown to form part of a single system of fraud pursued by the prisoner. When once the continuity of the various transactions was shown, transactions after the date of the alleged particular crime were as relevant in proof of its general character as transactions before that date. *Reg.* v. *Holt* (1860) Bell C. C. 280; 30 L. T. (M. C.) 11 distinguished; *Reg.* v. *Francis* (1874) L. R. 2, C. C. 128, explained and extended.

On the second point, the Court held that the function of the Grand Jury being merely to say whether a *prima facie* case had been made out

by the prosecution, the evidence of the prisoner which was part of the defence could never arise for their consideration.

On the third point, they held that the Court had undoubtedly the right to comment upon the failure of the prisoner to appear and give evidence for the defence, and that the nature and degree of comment must depend upon the circumstances of each case.

Infringement of statute—Information by the Attorney-General—Injunction.

Attorney-General v. London and North-Western Railway

[1899, I. Q. B., 72.]

Where an Act of Parliament provides that the trains are to move at the rate of 4 miles per hour at a level-crossing, and information was filed by the Attorney-General to restrain the defendants from driving at any greater rate, it was held by the Court that the injunction should be granted and that the informant need not show that the act complained of had resulted, or was likely to result, in any injury to the public. The Court distinguished this case from those cases in which the action was to restrain a nuisance and the courts refused to interfere without proof of substantial injury, on the ground that in this case information was filed to enforce the *express* terms of an Act of Parliament.

Attorney-General v. *G. W. R. Co.* (1872, L. R. 7, ch. 767).
Attorney-General v. *Cockermouth Local Board* (1874, L. R. 4 Eq. 172).
Attorney-General v. *Sherewsbury Bridge Company* (1884, R. 1 Ch. D., 752) approved of followed.

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications:—

The Yearly Practice of the Supreme Court for 1899 by Muir Mackenzie, Lushington and Fox, in one Volume, published by *Messrs. Butterworth and Co., 7, Fleet Street, London* :—Prices 20 net.

Kelly's Draftsman, 3rd Edition, by West and Austin, published by *Messrs. Butterworth and Co., 7, Fleet Street London* :—Prices 12-6.

The Lawyer and Magistrate, Nos. 1 and 2 (*in exchange*).
The Bombay Law Reporter for January (*in exchange*).
The Albany Law Journal for January (*in exchange*).
The Calcutta Weekly Notes for January (*in exchange*).
The Allahabad Weekly Notes for January (*in exchange*).
The Green Bag for January (*in exchange*).

The Canadian Law Times for January (*in exchange*).
The Canada Law Journal for January (*in exchange*).
The Educational Review for January (*in exchange*).
The Indian Journal of Education for January (*in exchange*).
The Harvard Law Review for January (*in exchange*).

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The New Law Member.—We hope Dr. Thomas Raleigh may justify his selection to the important office to which he has been called. The place requires a man of exceptional ability. All that we know of him is that he was a good student at college, and has taken some degrees and prizes. He has not been a practising barrister, and his present position as Registrar to the Privy Council does not promise any special qualifications for the new sphere to which he has been called. It is true, Lord Macaulay without any special qualifications as a lawyer proved one of the ablest law-makers of this country by his masterly draft of the Penal Code. But even when he came to this country, Macaulay had achieved a reputation as a man of genius; and he came as a young man of thirty odd summers. But Dr. Raleigh is close upon 50, and has not made his mark within that time in England. Two jurists of high reputation—Maine and Stephen—have shed lustre upon the office. Hobhouse, Stokes and Ilbert were hard-working men who knew the law, and there are no blunders that we have to record against them. Their successors in the office—Scoble and Miller—proved failures. Chalmers had a name in England as a draftsman, but he has not made any reputation here. The law membership has been steadily passing into weaker hands. The result has been that pieces of legislation which at their inception had a logical consistency and completeness have been subjected to a process of tinkering which has changed the shape of the measures and made them look disjointed. Many a blunder of this description can be pointed out in the amendments that have been made in the Penal Code, the Codes of Procedure, and the Evidence Act. A law member who was master of the particular departments of law with which he was dealing and thoroughly conversant with the scheme of the legislation he was remodelling in the light of added experience would not commit the blunders that these more recent occupants of the office have fallen into. What we now know of the public career of Dr. Raleigh gives us no promise of a successful career in this country. But sometimes we are agreeably disappointed. Little did people know what a great and good Viceroy Lord Mayo would make before he landed on these shores. Let us hope that such a disappointment may be in store for us in the case of our new law member.

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Wit and Wisdom of Chief Justice Bleckley as shown in the Georgia Reports.

"When man and wife cö-ôperate for good they can do much good; and so, when they combine against third persons and cô-operate for evil, they can do much harm. In protecting women, Courts and juries should be careful to protect men, too, for men are not only useful to general society, but to women especially."—*Humphrey* v. *Copeland*, 24tS Ga. 548.

"In that stage of the litigation, even when the merits are clearly against the losing party, he should have such mental satisfaction as he could derive from having finished his speech. He should not be slaughtered with his address warm in his bosom, alive and undelivered. His case being finally and for ever lost, with his argument unheard, he would feel perhaps, and sometimes justly feel, that the outrage of deciding without hearing him was greater, far greater than the calamity of the adverse decision. He might get justice, but with it a wound from the Court more painful than any justice the Court could administer; for it is not impossible that a suppressed speech may occasion more mental torture than a lost case."—*Early* v. *Oliver*, 63d Ga. 18.—*The Green Bag.*

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The Wall Tax Road Murder Case.—This case was tried by a special jury and Mr. Justice *Boddam* was the presiding Judge. As usual there were various counts, murder, culpable homicide, grievous hurt, and so on. The jury returned a verdict of not guilty upon the first two and found the prisoners, seven in number, guilty under the minor heads by a majority of eight to one. The Judge said he entirely agreed with them. That, we suppose, meant that he agreed with the acquittal upon the graver heads of charge, though to many people present during the time of the summing up it looked as if the Judge was strong for a conviction, upon the first two counts also.

After expressing his entire agreement with the jury, the Judge said to the prisoners that they had banded together to commit a brutal outrage and had committed grievous hurt, and that death was the result. We do not know what the Judge meant by this. If grievous hurt is intentionally caused and death is the result, the offence is culpable homicide. But the Judge had agreed with the jury in finding that the prisoners were not guilty of culpable homicide. What followed was even more curious. The prisoners were not old offenders; the sentence of the Court was rigorous imprisonment for ten years each. We do not wish to dwell upon the illegal sentence of 15 years, which the Judge first imposed. Except for the reason that the Judge disagreed with the

jury as regards the acquittal on the graver counts, we cannot account for this extraordinarily severe sentence. But would he be justified in keeping that disagreement to himself while expressing agreement with them and making the punishment heavy for the offences of which they are found guilty. We hear lectures to Subordinate Magistrates frequently on their ideas of punishment being very disproportionate to the crimes, sometimes too lenient, sometimes too severe.

We think the learned Judge might have thought over the matter more calmly before pronouncing sentence.

***

Review v. *Appeal.*—There is a curious fallacy which you cannot drive out of Mr. Justice *Davies*, argue it as you will. He thinks or seems to act as if he thought that if the lower court has committed a most glaring mistake, not in arriving at a finding of fact, but it may be in awarding a relief which was not asked for or in arriving at a judgment contrary to the admissions of parties, the error is a thing which can be corrected only by review, but not by appeal. There is nothing in the Code that prevents an appeal in cases where an error may be corrected by review. For the matter of that, anything may be corrected by review if only the Judge is willing to correct or intelligent enough to see the error and candid enough to avow it. Provided a person brings himself within the provisions of the Code as regards an appeal or second appeal, he is entitled to have it heard although there might have been another means of getting that relief. We have known several instances in which the learned Judge dismissed appeals and second appeals where the error of the courts below was clear, on the ground that the matter in error was one for review.

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The New Stamp Law.—The Indian Stamp Bill has passed into law as Act II of 1899 and comes into force on the 1st day of July 1899. When the Bill was first introduced we drew attention in 7 M. L. J. to several defects and suggested several improvements. Some of our minor suggestions have been accepted, but several matters of principle on which we had touched have received no attention. We had drawn attention to the unjust rule in force alike in this country and in England that where a document not duly stamped had been lost, no secondary evidence could be given and appealed to the Legislature to abrogate it with such limitations as it might seem proper to them. We were also of opinion that there was not very much in favor of the rule that promissory notes, bills of exchange and instruments chargeable with a duty of one anna

should not be receivable in evidence even on payment of a penalty. The definitions of the terms *Bill of Exchange* and *Promissory Note* have been very much enlarged, but the rule is still retained, that payment of a penalty cannot render such instruments admissible.

We would draw the attention of the public to some of the changes effected by the new law which comes into force from July 1899. An instrument of partition is now defined so as to include an order of a Civil Court for effecting a partition and an award by an arbitrator directing a partition. There is a small item of careless drafting in the Act. An instrument attested by a witness and not payable to order or bearer whereby a person obliges himself to pay money to another is within the definition of a bond. A promissory note is defined in the Act and is said to mean a promissory note as defined by the Negotiable Instruments Act. But an instrument attested by a witness and not payable to order or bearer is a promissory note under the Negotiable Instruments Act. Thus the same instrument falls under both heads of bond and promissory note. Great confusion must result from the definitions of the two terms overlaping each other. We noted with pleasure the provision in the Bill that a receipt which is unstamped may be received in evidence on payment of a penalty of one rupee. But we are sorry to find this beneficial provision limited to its admissibly only *against* the person who should have given a stamped receipt. An instrument *recording an adoption* is liable to a stamp of Rs. 10. We pointed out that the word *record* was liable to misconstruction, but it has nevertheless been retained. Before the present Act, instruments conferring authority to adopt were alone liable to stamp duty.

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We take the liberty of extracting the following interesting paragraphs from an article named "*Echoes of the Four Courts*" that appeared in the 2nd number of *The Lawyer and Magistrate.*

There are always more barristers than briefs about the Courts. When the legal tyro has put himself into a wig and gown, he must wait for the solicitors to put something in the brief bag. Meanwhile he stays his stomach with books and newspapers, preserving a decent corpulency; and waits his chance. He has a good time of it while he is waiting. The popular picture of the briefless barrister, conscious of his own neglected genius, eating his heart away in moody impatience, is all a mistake. As a rule, he has a much more modest and accurate estimate of his own powers, and a very wholesome terror of the first brief. So he bides his time good-humouredly, and is lucky enough to have the Four Courts Library and Four Courts to wait in.

* * * * *

Close to the entrance sits a big man with a big voice. I never heard elsewhere a voice of such smoothness and volume. Whether he was chosen specially for this accomplishment I cannot say, or how the competitive examination was conducted. But certainly it is the one essential accomplishment for his post. When any barrister is wanted by a solicitor for instruction, courts, or consultation, this Stentor is appealed to. Forthwith he sends the name of the barrister rattling in sonorous thunder through the utmost recesses of the Library. The sound, pleasantly suggestive of briefs and fees, is instantly obeyed. It is the practical call to the Bar.

* * * * *

In the Courts below half a dozen jury cases were in full swing. A man coming up from the Courts was amazed to see the Nisi Prius leader idling at the Library fire.

"Holloa!" he cried, "How is it that you are not engaged in any of the cases that are on to-day?"

"My dear fellow," was the calm reply, "I am in all of them, and I like to be impartial."

* * * * *

A wise old lawyer of our own time, looking over the shoulder of a pupil who was engaged in writing an opinion on some apparently simple question, ran his pen through the words, "I am *clearly* of opinion," which the novice had written. "My young friend," he said, "Never write that you are *clearly* of opinion on any question of law. When you have my years and experience the question you will always have to determine is, on which side the doubt predominates."

* * * * *

In the law reports, too, are to be found jests as good as the best of much maligned Joe Miller. It is, for example, gravely recorded in one quaint old volume how two high waymen fell out over the division of spoils, and one brought a partnership suit in an Equity Court against the other. The pleadings were all in regular form; the "trading" partnership" fully set out. The "stock-in-trade," consisting of masks, horses, swords, pistols and blunderbusses, was duly and regularly scheduled. Then it was gravely recorded that "the said partners as aforesaid, to wit, the plaintiff and defendant, regularly traded at Hounslow Heath, and at divers other highways, heaths and commons of the realm and elsewhere, in purses, watches, snuff-boxes, jewels and other articles of value, and by means of such trading acquired a large number of said purses, watches, snuff-boxes jewels and other articles of value as aforesaid.

But the said defendant refused, and still neglects and refuses, to account to the plaintiff for his equal share of the profits acquired by said trading, as by the aforesaid partnership expressed and provided."

The parties to this remarkble Equity suit were hanged, and their solicitors clipped of their ears and clapped into prison; so the grim joke ended.

* * * * *

A Law Court may be fairly described as a theatre, with the added interest of reality. Therein are enacted "tragedy, comedy, history-pastoral, pastoral-comical, historical-pastoral, tragical-pastoral, tragical-historical-comical-pastoral," often blended together as in real life in inextricable confusion. Almost invariably we find the newspaper report of a trial—even of a murder trial—punctuated with "laughter." A division of labour is usually observed in the humours of a Court. Jokes are provided for the most part by the Judges, and the laughter by the counsel. But now and again the fun breaks out in unexpected places, and even the witnesses and the parties themselves provide their quota for the general amusement. It may, I think, be fairly assumed that if Law Courts are amusing, Irish Law Courts have their fair share of the fun. It is on that hint I write. I offer no warranty of the truth in whole or part of the stories that follow; let them stand or fall on their own merits. A good story is none the worse of being seven-eighths invention; a dull story none the better of being all true.

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The Passing of Executrix: The legislature of New York, at its last session, passed an act doing away with the term "executrix," and providing that executors of the feminine gender shall henceforth be called and known as "executors." How the strongminded of the tender sex will take this remains to be seen. Will they construe it as a compliment elevating them to the rank of their tyrants as a matter of course, or as a degradation, abolishing a distinction hitherto cherished as a privilege? —*The Green Bag.*

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The following epigrams were exchanged between James Smith and Sir George Stewart Rose, on the subject of Craven street, Strand, where the former was then residing:—

James Smith.

At the top of my street the attorneys abound,
And down at the bottom the barges are found.
Fly, Honesty! fly to some safer retreat,
For there's craft in the river and craft in the street.

Sir George Rose.

Why should Honesty fly to some safer retreat,
From attorneys and barges? odd rot'em!
For the lawers are *just* at the top of the street,
And the barges are *just* at the bottom.

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The Right to Privacy.—It has long been public opinion that there must be found some principle of law to protect the privacy of the individual from the paragraphs, caricatures, and advertisements of the public print. A development in the law to meet this opinion would seem to be arrested by a recent decision in the Queen's Bench Division. *Dockrell* v. *Dougall*, 78 Law Times Rep. 840. In this case the plaintiff was a physician, the defendant, the owner of a medicine called Sallyco. In an advertisement of his medicine the defendant published of the plaintiff, with substantial truth, but without authorization: "Dr. Morgan Dockrell, physician to St. John's Hospital, London, is prescribing Sallyco as an habitual drink. Dr. Dockrell says nothing has done his gout so much good." For this the plaintiff brought an action; but the suit was dismissed upon the ground that there was no injury to the plaintiff's property or reputation.

The present actions for defamation fail to give a remedy in two classes of cases where there may often be actual wrongs. When a statement is false but is neither libel *per se* nor a cause of pecuniary loss, and when a publication is true, there are no actions for defamation. The existence of this unredressed residue in the law governing publication has given rise to the question whether the modern law does not recognize something in the nature of a right to privacy to protect personal appearance, sayings, acts, and personal relations from unwished publicity. This hypothesis of a right to privacy has appeared by way of *dictum* in late American reports. *Schuyler* v. *Curtis*, 174 N. Y. 434. The tendency of English authority has also been definitely in the same direction until the refusal of a remedy in the principal case. *Prince Albert* v. *Strange*, 2 De G. & Sm. 652. The general result has been that with various reasons and in varying ways relief has been given in the case of some outrages against privacy; but the existence of a special category of rights to privacy has not been clearly realized, or the limits precisely defined. *Dixon* v. *Holden*, L. R. 7 Eq. 488.

The principle upon which a right against an invasion of privacy depends appears from a simple analysis of rights. Even crudest common law protected the person from more than mere batteries; it considered

assaults and insults trespasses as well. The essential element in the trespass was the invasion of the person against the person's will. As sensations grew more intense, that became an invasion of the person which a ruder age did not so consider. The redress for the invasion of privacy may than well be a modern phase of the protection given to the person since the ancient trespass. If this view be correct, any publication which invades the privacy of a private individual, or such privacy of a public individual as he had not forfeited by his position, is a *prima facie* injury without more damage:—*The Harvard Law Review.*

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The Rights of Unborn Children.—The question whether an unborn child has civil rights,—whether an infant may recover damages for injuries received before birth,—is a rare one in the law. It was squarely raised, and decided against the child, *Dietrich* v. *Northampton*, 138 Mass. 14, and discussed in *Walker* v. *Gt. Northern Ry. Co.*, 28 L. R. (Ireland), 69. It has now been brought up again in *Allaire* v. *St. Luke's Hospital*, Appellate Court, First District of Illinois, 30 Chic. Leg. News, 333. There the plaintiff's mother was received by the defendants, a lying-in hospital, for treatment during child-birth. The defendant's neglect,—which was clearly tortious as to the mother,—was the direct cause of an injury to the plaintiff while still in the womb. It is hard to imagine a case in which the facts would be more favorable to the child and more likely to prejudice a court, but it was held that the child could not recover for his injury.

The position of a child *en ventre sa mere* in the other departments of the law gives little sanction to a proposition for granting them civil rights. They are considered in the law of property, but their rights do not come into existence until birth and then relate back. This fiction of relation does not involve any idea of a child *en ventre sa mere* as a separate entity, and at best is a special equitable provision. The criminal law is harder to understand. It is murder or manslaughter if one injures a child *en ventre sa mere*, and that child be born alive, and later dies of the injury. 3 Inst. 50. *Rex* v. *Senior*, 1 Moo. C. C. 346. It is argued that every murder must of necessity be a tort, and that, therefore, there has been a tort against the child in the womb. The answer to this contention probably is that the criminal law has made an error, though a very natural one, in placing this crime against the child in the category of murder; that the fundamental conception of homicide is the application of some force to a human being, a member of society; that this crime properly belongs in the category with the offence of procuring an abortion. The cases that have called the crime murder or

manslaughter have stated no reasons, and the suspicious principle clearly forms no sound basis for analogy.

And not only would it be without precedent in law to allow the child to recover damages for an injury sustained before birth, but it would create an anomalous right. If the child has a right of action it must arise at the time of the injury, but at that time it is uncertain whether the child will be born alive, so that a right of action is created which is contingent on a subsequent irrelevant fact. Strong reasons of public policy too are against allowing this new right of action,—infinitely difficult questions of fact would come before juries, and the courts would be filled with cases brought in bad faith:—*The Harvard Law Review.*

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Is a View by the Jury Part of the Trial?—A trial for murder is so laborious and protracted an affair that some courts are inclined to search far for reasons by which to avoid setting aside a trial once held for a mere technical error of procedure. The case of *People* v. *Thorn*, 50 N. E. Rep. 947 (N. Y.), is perhaps an example of this inclination. A murder had been committed under particularly atrocious circumstances. In the course of the trial, the jury were sent to take a view of the premises where the crime was committed. The prisoner at his own special request did not accompany them; but when the verdict of guilty was finally rendered, he raised the objection that he had not been present through the whole trial, and was therefore entitled to be tried again. The Court of Appeals overruled this objection (O'Brien and Bartlett, JJ., dissenting). The possibility of the prisoner waiving his rights was passed over, and the decision was rested on the ground that he had, as a matter of fact, been present during the whole proceeding, that the view was not a part of the trial, and "that the knowledge acquired by the jury in inspecting the premises was to enable them to better understand the evidence and not to obtain original testimony." The weight of authorities seems against this position. *People* v. *Palmer*, 43 Hun, 401; *People* v. *Bush*, 68 Cal. 623; and the weight of reason is also opposed. In this particular case the absence of the accused does not seem to have influenced the decision. But under different circumstances it might well prove of great importance to have the opportunity of observing the conduct and actions of the jury when taking the view. Suppose, for instance, between the murder and the trial the premises had accidentally become changed in appearance, the jury noting the discrepancy between the testimony and the facts might draw conclusions of vital moment against the defendant's witnesses. If it be argued that the jury

are forbidden by the court to draw conclusions from what they see, the answer is that it is impossible to enforce obedience. Throughout the whole trial the jury must necessarily be comparing the testimony they hear with what they have seen. It is noteworthy, moreover, that when handwriting, bloodstains, or footprints are shown the jury, it is called the production of real evidence, and no one contends that examination by the jury of these matters is not a part of the trial. A "view" is hard to distinguish from this so-called real evidence. Giving the juryman a view of the premises is something more than giving him a mere instrument, like an eye-glass or an ear-trumpet. It is furnishing him with a basis for inference which will unavoidably be utilized. Hard though it seems to nullify a whole proceeding for such a small reason, yet it is better so, than to set a precedent of disregarding the rights of persons accused of crime:—*The Harvard Law Review.*

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Life Insurance—Assignment—Wagering Policy.—W. insured her life in favor of her executors, administrators, and assigns. She then assigned the policy, according to a prior agreement, in consideration that the assignee pay the premiums. The assignee had no insurable interest in the life of the insured. *Held,* that a legally entitled beneficiary may assign a life-insurance policy to one having no interest. But that the facts in this case showed the assignment to have been a colorable one, the effect of the prior agreement being to make the assignee substantially the real applicant; the policy was therefore a wagering one, and the assignee could not recover on it. *Clement v. N. Y. Life Ins. Co.*, 46 S. W. Rep. 561 (Tenn., Sup. Ct.).

This decision represents the prevailing view in this country, that the assignee of the beneficiary of a life-insurance policy need have no interest in the life insured. *Mutual Life Ins. Co.* v. *Allen,* 138 Mass. 24. It also seems a correct interpretation of the facts that such a policy as that in the principle case is a wagering one. An arrangement, the effect of which is to make the apparent applicant a mask for the really interested party, who stands no chance of loss beyond his premiums, nearly makes a policy a gambling transaction. *Olmstead* v. *Keyes,* 85 N. Y. 593:—*Harvard Law Review.*

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Torts—Negligence—Intervention of a Third Party.—The plaintiff was injured by a trunk being thrown against him during a struggle between public porters over baggage left in an insecure position by a servant of the defendant. *Held,* that the negligence of the defendant's

servant was not the direct and proximate cause of the plaintiff's injury. *Murphy* v. *Great Northern Railway Co.*, [1897] 2 I. R. 301.

The case is on the border line, but is correctly decided if the result could not have reasonably been foreseen by the original wrongdoer,—a point upon which the judges touch but lightly. The general rule is that the intervention of a malicious and intentional act of a third party relieves the original wrongdoer of any liability for the results of his negligence. *Alexander* v. *Town of New Castle*, 115 Ind. 51. The mere negligence of an intervening third party, however, does not necessarily break the causal connection between the injury and the original act, especially if, under the circumstances, the intervening negligent act ought to have been anticipated. *Lane* v. *Atlantic Works*, 111 Mass. 136. The present case seems to have been put on the ground that the acts of the porters were acts of "affirmative misconduct" and not of mere negligence. It is questionable whether the majority of courts in this country would follow this case when the misconduct of the third person ought to have been foreseen:—*The Harvard Law Review.*

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Torts—Negligence—Liability for False Statements.—Defendants, directors of a bank, negligently but not fraudulently made false statements as to the condition of the bank. Plaintiff, relying on these statements, purchased stock, which proved worthless. *Held*, that defendants are liable for the damage caused by their statements. *Houston* v. *Thornton*, 29 S. E. Rep. 827 (N. C.).

The English House of Lords decided, in *Derry* v. *Peek*, 14 App. Cas. 337, that similar facts would not support an action of deceit. That case has generally been regarded as settling in England that no action will lie for negligent mis-statements. *Angus* v. *Clifford*, [1891] 2 Ch. D. 449. There was, however, no allegation of negligence in the declaration, so that the point is really a *dictum*. Massachusetts has followed the English doctrine. *Nash* v. *Minn. Tille and Trust Co.*, 163 Mass. 574. But in many States the question is still open. The decision in the principal case seems sound. Granting that deceit will not lie, it seems that an action for negligence should. One who makes positive statements, intending them to be acted upon, should be bound to use ordinary care to see that they are warranted, at least when the statements are made to secure a result which will operate to the personal advantage of the one making them:—*The Harvard Law Review.*

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Torts—Slander—Privilege.—*Held*, that to justify the speaking of slanderous words on the ground of privilege it must appear, not only that the defendant believed he was speaking the truth, but that there were reasonable grounds for such belief. *Toothaker* v. *Conant*, 40 Atl. Rep. 331 (Me.).

The question raised has been passed upon in only a few American jurisdictions, and the majority of the decisions are in accord with the principal case. *Carpenter* v. *Bailey*, 53 N. H. 590; *Express Printing Co.* v. *Copeland*, 64 Tex. 354; *Briggs* v. *Garrett*, 111 Pa. St. 404. In England it is held that a defendant may avail himself of the defence of privilege if his motive is not wrongful and he has an honest belief in the truth of his statements. *Clark* v. *Molyneux*, 3 Q. B. D. 237. In accord with the English decisions is *Bays* v. *Hunt*, 60 Iowa, 251. It seems to be the better view, however, that immunity is extended sufficiently if a defendant is allowed to escape liability for defamatory statements only when they are made upon a reasonable belief in their truth. This rule checks the spreading of false reports coming from sources on which many persons would rely, but which reasonable people generally would not credit:—*The Harvard Law Review.*

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Immorality On The Judicial Bench.

By *T. Crisp Poole, Esq., Barrister-at-Law, Brisbane, Queensland, Australia.*—The writer of the following remarks has long felt that the matter of which they treat is one that should be brought before the serious notice of rulers and of the legal profession; and considers that the Medico-Legal Journal would be a good medium for the ventilation of the subject. They are written in consequence of the melancholy fact that men of notoriously immoral lives have been permitted, in certain places, to occupy high positions on the judicial bench.

It only needs very little reflection to see the incongruities and dangers which may and do arise when such a state of affairs is tolerated. A man who has the power of sending another to prison, if not of stainless life himself, is not very likely to be able to apportion the right amount of punishment to the delinquents who are convicted before him; and will very likely be too lenient to vices with which he is himself in sympathy, while to compensate for this he will be very severe on persons convicted of crimes of another character. In illustration of this the writer may mention the case of a judge reputed to be exceedingly immoral, who dealt very lightly with a man who was brought before him on a charge of bigamy and who, at the same session of the court,

sentenced a man convicted of larceny (it is admitted that he was an old offender) to penal servitude for twelve years. This judge had a great deal to say, while passing the latter sentence, about the duty that he owed to the public; apparently unconscious that one of the duties of his high position was to set such an example in all things that public confidence in his fitness for the office should not be shaken; nor vice encouraged by the spectacle of its being made light of by men appointed for the preservation of virtue. Such things are of far greater import than protecting the public from the depredations of a thief; albeit one whose past record shows him to be one who would put liberty to a bad use.

But it is not only in the direction of the administration of criminal law that the evils are apparent of allowing the immoral man to sit in the judicial chair. Many are the causes brought before our civil courts, which turn more or less on the immorality of one of the parties concerned, and where the law cannot be laid down, nor justice administered, without the presiding judge, if immoral himself, reprehending conduct from the bench as the like of which he is himself guilty. A certain judge, now dead, is reported to have separated from his wife and to have lived in open adultery with the wife of another man. Is such a man the right person to adjudicate on a case where a dissolution of marriage is sought for on the ground of adultery of one of the parties; and would the aggrieved party have confidence that the case will be impartially heard, when the presiding judge is a man who might himself be made a defendant in a similar action? Nor is this the whole extent of the evil; for unless immoral men are precluded from occupying seats on the bench, the possibility will arise (though, it is to be hoped, not the probability) of the whole of the judicial staff of a certain state being composed of men of this character, so that the would-be suitor cannot even secure that his cause shall be brought before a judge who is right-minded in his principles and conduct.

"*Ex turpia causa non oritur actio.*" Such is a maxim of the common law of England. But the immoral judge is in an invidious position when this maxim is pertinent; and he must either (assuming that he is not wilfully corrupt) be swayed and biased by his private sympathies; or in the administration of the law he must lay down principles of conduct at startling variance with his own actions; in other words, he must preach one thing while he practices another. Nor must the effect on the minds of the public be lost sight of when judges from their high position are heard to utter maxims including purity of life, when it is well known all the while that there is no greater vioaltor of the principles thus preached than the judge who utters them. Nor, on the other hand, is the case

made better if a sense of the inconsistency should stay the judge from enunciating those rules of virtue which it is the policy of the law to uphold no less than the interests of morality to guard. We should see the incongruity of allowing a thief to preside at the trial of a man charged with larceny; is it less inharmonious to see an adulterer trying a case of which the essence is the adultery of one of the parties?

Another, though minor consideration which arises in connection with the question, is the embarrassment which may be occasioned to advocates in pleading causes of a certain character before men of immoral lives. It is sometimes necessary for the advocate to reprehend in the strongest terms the conduct of some of the parties concerned in a case; and when the case turns upon infidelity in conjugal relations or deviations from virtue of a like nature, the advocate under the supposed circumstances may be painfully aware that in condemning the conduct of the parties he is condemning that of the judge who is hearing the case. It is to be hoped that there are not many members of the bar who would allow considerations of personal interest to interfere with the discharge of their solemn obligation to say all for their client that may reasonably be expected to aid his cause. Yet is it fair to the advocate that he should be exposed to the risk of offending by his plain speaking a man upon whose good will so much of his prospects in life may depend? He will need great boldness, sometimes, should he dare to rebuke laxity of morals at a tribunal where to utter such words would engender a consciousness that the presiding judge may construe them as an indirect reflection on the known facts of the judge's own life.

In other professions purity of morals is taken into consideration when deciding upon a man's fitness for an office of trust. To say nothing of the office of a clergyman, which is directly concerned with leading men to the contemplation of holy things, there are secular callings where the incongruity would be palpable of having the position filled by a man of loose life. A schoolmaster might have all the genius of Dr. Arnold for organization, discipline, and instruction; yet let him be without the high Christian principles of that great teacher, and never would he leave behind him a like example, or exercise so beneficent an influence over the pupils committed to his charge; and were he a man of known immorality, there are few parents who would be willing to trust their children to his care. An immoral professor of medicine would be shunned by the respectable part of the community, no matter how great his professional skill, and be regarded as an improper man to perform some of those delicate operations which it is at times necessary for the respectable practitioner to undertake. Is the office of administering justice

less sacred than those of training the young or of ministering to the wants of the sick, and can we better afford to disregard moral fitness for occupying the seat of judgment than when we are concerned with education or healing?

Christianity is said, in England, to be part of the law of the land; and although there is now no established church in the United States of America, in Ireland, or in the British colonies, we have nevertheless not so far lost faith in the superhuman origin of a certain record but that we still ask our judges, our jurymen, and our witnesses to swear by that record to discharge their duties to the best of their conscientous ability. Upon the volume which declares the Divine prohibition to be "Thou shalt not commit adultery" the adulterous judge invokes the aid of the Deity in the discharge of duties invoking possibly the condemnation of adultery. If such a state of things does not prejudice the administration of justice, it is at least no incentive towards the preservation of morals; and it will be an honorable distinction to the state which declares, (it may be that such are already existing) that unsullied purity of life shall be no less requisite to a seat on the judicial bench than educational ability to discharge the duties of the office:—*The Medico-Legal Journal.*

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We take the liberty of extracting the following part of an address delivered at the unveiling of the Statue of Rufus Choate in the court house in Boston by Joseph H. Choate which will be found very interesting:—

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And first, and far above his splendid talents and his triumphant eloquence, I would place the character of the man, pure, honest, delivered absolutely from all the temptations of sordid and mercenary things, aspiring daily to what was higher and better, loathing all that was vulgar and of low repute, simple as a child, and tender and sympathetic as a woman. Emerson most truly says that character is far above intellect, and this man's character surpassed even his exalted intellect, and, controlling all his great endowments, made the consummate beauty of his life. I know of no greater tribute ever paid to a successful lawyer, than that which he received from Chief Justice Shaw, himself an august and serene personality, absolutely familiar with his daily walk and conversation, in his account of the effort that was made to induce Mr. Choate to give up his active and exhausting practice, and to take the place of professor in the Harvard Law School, made vacant by the

death of Mr. Justice Story, an effort of which the Chief Justice, as a member of the corporation of Harvard, was the principal promoter. After referring to him then, in 1847, as "the leader of the Bar in every department of forensic eloquence," and dwelling upon the great advantages which would accrue to the school from the profound legal learning which he possessed, he said: "In the case of Mr. Choate, it was considered quite indespensable that he should reside in Cambridge, on account of the influence which his genial manners, his habitual presence, and the *force of his character*, would be likely to exert over the young man, drawn from every part of the United States to listen to his instructions."

What richer tribute could there be to personal and professional worth, than such words from such lips? He was the fit man to mould the characters of the youth, not of the city or the State only, but of the whole nation. So let the statue stand, as notice to all who seek to enter here, that the first requisite of all true renown in our noble prefession —renown not for a day or a life only, but for generations—is Character.

And next I would point to it is as a monument to self-discipline; and here he was indeed without a rival. You may search the biographies of all the great lawyers of the world, and you will find none that surpassed, I think none that approached him in this rare quality and power. The advocate who would control others must first, last and always control himself. "Every educated man," he once said, "should remember that 'great parts are a great trust,' " and, conscious of his talents and powers, he surely never forgot that. You may be certain that after his distinguished college career at Dartmouth—first always where there was none second—after all that the law school, and a year spent under the tuition of William Wirt, then at the zenith of his fame, could lend to his equipment, and after the five years of patient study in his office at Danvers, where he was the only lawyer, he brought to the subsequent actual practice of his profession an outfit of learning, of skill and research, which most of us would have thought sufficient for a lifetime. But with him it was only the beginning. His power of labor was inexhaustible, and down to the last hour of his professional life he never relaxed the most acute and searching study, not of the case in hand only, but of the whole body of the law, and of everything in history, poetry, philosophy and literature that could lend anything of strength and lustre to the performance of his professional duties. His hand, his head, his heart, his imagination were never out of training. Think of a man already walking the giddy heights of assured success, already a senator of the United States from Massachusetts, or even years afterwards, when the end of his professional labors was already in sight,

schooling himself to daily tasks in law, in rhetoric, in oratory, seeking always for the actual truth, and for the "best language" in which to embody it—"the precisely one right word" by which to utter it—think of such a man, with all his ardent taste for the beautiful in every domain of human life, going through the grinding work of taking each successive volume of the Massachusetts Reports as they came out, down to the last year of his practice, and making a brief in every case in which he had not been himself engaged, with new researches to see how he might have presented it, and thus to keep up with the procession of the Law. Verily "all things are full of labor; man cannot utter it: the eye is not satisfied with seeing, nor the ear filled with hearing."

So let no man seek to follow in his footsteps, unless he is ready to demonstrate in his own person, that infinite work is the only touchstone of the highest standing in the law, and the sluggard and the slothful who enter here must leave all hope behind.—*The Green Bag.*

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Officialdom in Germany has been compelled by a bicyclist to give deep thought to the question, "When two streets intersect, in which street is the point of intersection?". At Breslau, bicyclists are forbidden on certain streets. A rider, going along a street where they are allowed, followed it across a prohibited street, and was arrested in the middle of the road. He asserted that he was in one street, the policeman that he was in the other, the lower court that he was in neither, and should not be fined; and the upper court that he was in both, therefore on the forbidden street, and must pay twenty-five cents.—*The Green Bag.*

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William M. Evarts:—"*A Great* corporation once desired a legal opinion on a matter involving millions of dollars, for upon it practically depended that corporation's very existence. They decided to refer the question, which was wholly one of the correct interpretation of law, to William M. Evarts, and to be guided by his opinion. Evarts's reputation and success are wholly due to his remarkable knowledge of law, and his power, which seems almost like intuition, of determining just how the Supreme Court will decide any question of law. When the attorney for the great corporation put his question, Evarts sat buried in thought for a moment, and then answered in one word, 'Yes.' His bill for that one word was two hundred and fifty thousand dollars, and the corporation paid it without a murmur, Evarts's answer proved to be correct." It is a good story, anyway.—*The Green Bag.*

REVIEWS.

The Lawyer and Magistrate (Monthly). Published by Joseph Dollard, Wellington Quay, Dublin: Annual subscription, 10*s*. 6*d*.:— We gladly welcome our new contemporary to our exchange list. We have received the first two numbers of this Journal and find them highly useful. It is a monthly Magisterial Journal and a legal review of reviews and if we can judge of the character of the Journal from the two numbers before us, the contents will be as interesting as they are varied. The Journal publishes reports of criminal cases in England, Ireland and Scotland, leading articles upon current topics of interest, summaries of articles in other legal Journals, besides a number of other articles upon miscellaneous topics. We hope the Journal will maintain the standard of excellence promised by the opening numbers, and feel sure that will be welcomed by lawyers and magistrates in this country as well as in the United Kingdom.

Kelly's Draftsman, by West and Austin, 3rd Edition. Published by *Butterworth & Co., 7, Fleet Street, London, E.C.*: Price, 12*s*. 6*d*.:— This is an excellent little hand-book of conveyancing, and the variety of forms given in the book is far more extensive than any that we have seen within the compass of a hand-book. Many of the forms given in the book are not found in ordinary works on conveyancing. Besides giving forms on the familiar subjects of sales, mortgages, leases, settlements, wills and bonds, the book contains a number of miscellaneous forms which are sure to be appreciated by students. The book ought to be in the hands of every student of conveyancing who is in search of a useful hand-book on the subject.